90-1226 (1)

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM 1990

WILLIAM HOPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the arrest of the petitioner for a purported traffic offense was objectively reasonable or was pretextual and without probable cause?

2. Whether the Court of Appeals correctly interpreted Illinois law in holding that the referral of petitioner to a drug treatment program upon a plea of guilty in a proceeding wherein the finding of guilt, judgment and sentence were withheld constituted a conviction for purposes of sentence enhancement under Title 18 United States Code Section 924(e)?

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WILLIAM HOPE,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, William Hope, by his attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the conviction and sentence herein.

OPINION BELOW

The Court of Appeals entered an order on October 19, 1990, denying petitioner's petition for rehearing and suggestion for rehearing en banc. A copy of the order is reproduced in the appendix at page 19a.

The Court of Appeals entered its judgment affirming petitioner's conviction on June 27, 1990. It is reported as United States v. William Hope, 906 F.2d 254 (7th Cir. 1990) (88-3134). The court's opinion is reproduced in the appendix at page 1a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on June 27, 1990. Rehearing was requested and denied on October 19, 1990. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are set forth in the Appendix at page 20a:

United States Constitution, Fourth Amendment

Illinois Revised Statutes, 1974, Chapter 91 1/2, Sections 120.9 and 120.10

STATEMENT

William Hope was prosecuted for possesion of a firearm by a convicted felon under Title 18 United States Code 922 (g)(1). Hope and Theresa Ramirez were arrested at about 1:30 a.m. on September 3, 1987. (Transcript of proceedings, hereinafter "Tr." 251, 253, 41, 65). Hope and Ramirez were driving cars which were stopped within 40 to 50 feet of each other. (Tr. 71, 251).

Ramirez was driving a 1975 Cadillac. (Tr. 250-251, 253). She had driven to her home about 45 minutes before her arrest. (Tr. 254). She went into her home and brought to the car some clothing and a gun secreted inside an automobile battery, which she placed in the trunk. (Tr. 254-255, 259, 279).

Ramirez brought the gun with her

whenever she went out at night. (Tr. 255). She had had the gun about one month, receiving if from her cousin Vito Ramirez. (Tr. 254-55). Vito Ramirez was interviewed by the prosecutors, (Tr. 270) yet was not called to refute Theresa Ramirez's testimony that he had given her the gun.

Ramirez had known William Hope for a year or two. (Tr. 259). Hope's mother lived on her block and she understood him to live there also. (Tr. 259). She had regarded him as a friend. (Tr. 270). Moments before her arrest Hope walked from his mother's house to a car, a Chrysler station wagon. (Tr. 260).

As Ramirez began to drive away from her home, Hope drove in front of her in his car. (Tr. 261). Hope made two right turns and was stopped by the police. (Tr. 261). Ramirez stopped at the stop sign

at the corner. (Tr. 251-252). She too made two right turns (Tr. 253). She proceeded around Hope's and the police officers'cars and was then herself stopped by two other police officers. (Tr. 262).

Although Ramirez had been stopped merely for the purported failure to stop at a stop sign, the interior of her vehicle was searched. (Tr. 284). Marijuana was said to have been found in the back seat of the car, (Tr. 284, 287) and she was placed in handcuffs. (Tr. 316). Officers were searching the trunk of her car as well (Tr. 288) but they had not found the gun while she was still on the scene. (Tr. 288). They had seen the battery but had not opened it and found the gun. (Tr. 263, 288).

Ramirez was taken to the station.

(Tr. 263). She saw Hope brought into the station (Tr. 362) but the battery and gun had not yet been recovered. (Tr. 263). She later saw the battery and gun on a desk. (Tr. 263). Hope was in a room across from her. (Tr. 263-64).

Both Hope and Ramirez, by the testimony of the officers involved, were initially stopped for committing traffic offenses; Hope for driving on a suspended license (Tr. 62-63) and Ramirez for failure to stop at a stop sign. (Tr. 39). At Hope's sentencing hearing, it was disclosed that he was viewed by the Chicago Police Department as a leader of the Black Gangster Disciples street gang. (Tr. 462, 548). The Black Gangster Disciples had a reputation among law enforcement personnel responsible for gang-related activity. (Tr. 439). One of the Chicago Police Department experts

on street gangs, Thomas Ward, testified that he viewed Hope as a gang leader, he admitted that he was "after" Hope (Tr. 462, 464), and had been for a long time. (Tr. 462, 464). Officer Ward was relied upon by the department to supply information about street gangs. Numerous residences that Hope was thought to live at or frequent were raided by police officers and federal agents in an effort to secure weapons or drugs as evidence against Hope. (Tr. 464, 466). These raids occurred shortly before initiation of this federal prosecution of Hope. (Transcript of proceedings, April 29, 1988, p. 19-20).

All the officers involved in the purported traffic stop of Hope and Ramirez were assigned to Chicago's Nineteenth District Tactical Unit. (Tr. 34, 98, 128, 311-12). The tactical unit

had particularized responsibilities for gang activity and narcotics. (Tr. 34). Tactical officers work in unmarked squad cars and plainclothes. (Tr. 128). The patrol division (as opposed to the tactical units) had responsibility for routine patrol. (Tr. 33-34).

The Nineteenth District covers a specific geographic area of Chicago and was staffed by eight officers and a supervising sergeant on each shift. (Tr. 33, 98). At least five (and perhaps six) officers (Leonard, Naughton, Baiocchi, Kaplan and Taylor) and the supervising sergeant (Cotter) of this eight person unit with district-wide responsibilities for gang activity and narcotics were purportedly patrolling in an area of but a few blocks and were all present at the scene of Hope's arrest for a suggested traffic violation. (Tr. 35, 64, 98, 312-

313).

Officer Leonard a patrolman for twenty years, testified he was patrolling in his unmarked car with his partner, James Naughton. (Tr. 31, 33-35, 37). Naughton also had been with the police department for twenty years as a patrolman. (Tr. 128). Around 1:15 a.m. they were in the area of the arrest. (Tr. 35-37).

Leonard testified he saw a Cadillac with its engine running, double parked and a woman (Ramirez) in the car. (Tr. 37). Naughton not only testified that he saw the car double parked but also testified that he saw Ramirez standing at the driver's side. (Tr. 130, 158). Naughton had previously testified that when he first saw Ramirez she was driving the car through a stop sign without stopping. (Tr. 155).

Ramirez was not issued a ticket for being double parked. (Tr. 143). The officers did not talk to her about the car. (Tr. 144). Though the car being double parked was an acknowledged offense, the officers neither issued a citation nor asked Ramirez, for identification. (Tr. 68). Naughton had previously issued citations for double parked cars, (Tr. 145) and admitted that the usual procedure with double parked cars was to either issue a citation or have the person move the car. (Tr. 145). The officers took neither course of action as to Ramirez' car. (Tr. 145).

Instead, a registration check on the car was run. (Tr. 38). The officers took up surveillance within a block of the Hope residence (Tr. 99, 260) and maintained their position for 10 to 15 minutes. (Tr. 38).

Sergeant John Cotter, the supervisor of the unit, arrived on the scene in his unmarked car and pulled up next to Leonard and Naughton. (Tr. 38, 98). Cotter a sergeant for 11 years, had been with the department for 27 years. (Tr. 97). He too was scheduled to go off duty. (Tr. 98). He testified he heard one of his cars request a licence check just before 1:30 a.m. (Tr. 98). He communicated with his officers and went to their location. (Tr. 99).

After 10 to 15 minutes Leonard said he saw the Cadillac pull away, run the stop sign at the corner and make a right turn. (Tr. 39). The officers followed the Cadillac as soon as it failed to stop at the stop sign. (Tr. 39, 70). As they were following the Cadillac Leonard testified he saw a second car, a Chrysler station wagon, pull up to the

initial stop sign. (Tr. 39, 56, 59). Naughton testified that the Chrysler station wagon "pulled out and turned behind" the officers. (Tr. 134). Naughton said he saw this car "out of peripheral vision," and didn't see it that well. (Tr. 134).

Although it was 1:30 a.m. and the street was heavily shaded by tall trees, (Tr. 76) Leonard described the lighting as adequate and testified he could see that Hope was driving the station wagon. (Tr. 40). Leonard contended he could identify the driver because the driver's window was open. (Tr. 66). Leonard stated he had seen Hope before, "walking" in the neighborhood. (Tr. 57). He asserted that when he saw Hope driving he recognized him and knew that he didn't have a driver's license. (Tr. 57).

Leonard and Naughton then stopped

the Cadillac. (Tr. 40). After stopping the Cadillac, Naughton testified he approached Ramirez and asked her for a driver's license, which she produced. (Tr. 136). Although she had been stopped merely for a traffic violation (failure to stop at a stop sign) and had produced a driver's license, her vehicle was searched. (Tr. 288, 316). Officers Geralyn Baiocchi and Steve Kaplan (who were also tactical as opposed to patrol officers) arrived and Ramirez was turned over to Baiocchi. (Tr. 137). It was then that Naughton joined Cotter and Leonard at the vehicle driven by Hope. (Tr. 137).

Officer Baiocchi, had been with the department only a year and four months, (Tr. 311) and with the tactical unit for only three months at the time of the arrests. (Tr. 311). She was called to

the scene upon the arrest of Ramirez. (Tr. 312). She and Kaplan had been nearby the location of Hope's arrest. (Tr. 313-314). At the scene, Baiocchi searched the person of Ramirez and placed her in her squad car. (Tr. 316). Ramirez was driven back to the station. (Tr. 317).

Cotter testified that as he was pursuing Hope he activated his blinkers and siren. (Tr. 104). The Cadillac was parked nearby. (Tr. 104, 123). Cotter approached the station wagon and asked Hope to step out. (Tr. 105-106).

As Hope stepped out, Cotter testified Leonard approached them. (Tr. 101). They asked Hope if he had a driver's license and Hope responded that he did not. (Tr. 106).

Leonard testified he exited his car, glanced into the Cadillac and went back

to help Cotter who was standing alongside the station wagon with Hope. (Tr. 41, 70). He testified Hope was told that he was "under arrest for driving without a valid driver's license" (Tr. 77) and advised "that he was driving without a driver's license, that his license was suspended based on prior knowledge." (Tr. 41).

Cotter testified a week or two prior to the stop of Hope a computer check had revealed his license to be suspended. (Tr. 111). No check had been run on the day of Hope's arrest or for the preceding week or two. (Tr. 111). As to the invalidity of the defendant's driver's license, Leonard claimed he had signed a traffic ticket as a witness, but he had not written it and did not know who had. (Tr. 60, 61). Cotter had not written it. (Tr. 60, 61). No ticket was produced at

trial. (Tr. 1-332).

A representative of the Illinois Secretary of State's Office testified at trial concerning information kept by the Secretary of State as to driver's licenses. (Tr. 223-224). He offered no testimony whatsoever and produced absolutely no records to indicate that William Hope's driver's license was suspended. (Tr. 223-232).

Although the arrest was purportedly for a traffic violation, Hope was immediately read "his rights" and placed under arrest. (Tr. 65). He was thereupon subjected to a custodial search. (Tr. 41).

After Hope himself had been searched, the car he was driving was also searched. (Tr. 41, 43). Leonard testified he found a bullet, lying on the passenger side floor board. (Tr. 41).

Leonard testified he also saw a battery on the floor and that a loaded revolver was recovered from inside the battery. (Tr. 44). The revolver was recovered when, by Leonard's testimony, it somehow came ajar as the officer moved it. (Tr. 87). The gun had been shipped from Florida to Chicago. (Tr. 175-177).

REASONS FOR GRANTING THE WRIT

I. THE ARREST OF THE PETITIONER WAS PRETEXTUAL, OBJECTIVELY UNREASONABLE, AND WITHOUT PROBABLE CAUSE.

In protecting the rights guaranteed by the Fourth Amendment to the United States Constitution, this Court has held, and never wavered from the proposition that "An arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. 452, 467, (1932). The evidence in this case virtually cries out pretextual arrest.

The police involved in this case engaged in a deliberate, calculated attempt to use a traffic stop as a pretext for searching William Hope and his vehicle to potentially secure incriminating evidence against him. Precisely the type of deliberate, pre-planned "subterfuge" which was decried in Taglavore v. United States, 291 F.2d 262, 267 (9th Cir. 1961).

Maryland v. Macon, 472 U.S. 463, (1985), Scott v. United States, 436 U.S. 128, reh. den., 438 U.S. 908, (1978) and other decisions of this Court have focused the inquiry concerning searches to a determination of compliance with a standard of objective reasonableness. There is compelling need to scrutinize the objective reasonableness of the actions of the police in this case and to assure that arbitrary, unjustified police

action is not condonned.

While some circuits adhere to the idea that an officer's motivation is itself determinative of whether an arrest is pretextual, See, e.g., United States v. Smith, 802 F.2d 1119 (9th Cir. 1986), most circuits however now "agree that an objective analysis of the facts and circumstances of a pretextual stop is appropriate." United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988). Yet a pretextual arrest is still unconstitutional. To determine whether an arrest was pretextual under the objective standard it must be determined whether a reasonable officer would (not could) have made the arrest, absent invalid purposes. See United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).

Traffic stops, being situations in

which citizens are clearly vulnerable to arbitrary police action, have been closely scrutinized by the circuit courts for pretextual arrests. As articulated in United States v. Jones, 452 F.2d 884, 888 (8th Cir. 1971), a search will not be sustained "if the arrest for a traffic violation is a mere pretext for an exploratory search."

William Hope was not arrested by conscientious policemen zealously enforcing traffic laws, nor by an officer making a chance observation of a motorist committing a traffic offense. He was arrested at 1:30 in the morning driving away from his mother's home by a sizeable task force of plainclothes, tactical officers who converged on him with calculation.

The Nineteenth District Tactical Unit whose officers arrested the

defendant, consisted of only eight officers and one supervising seargeant per shift. The unit was responsible for a large geographic area of the city of Chicago wherein regrettably, but assuredly, a substantial amount of criminal activity was ongoing. Yet two of these officers were able to justify the time to maintain a surveillance position for 10 to 15 minutes, less than one half block from the Hope residence supposedly to watch a double-parked car. (Tr. 39, 259). They suggested it was merely coincidence that they then happened to see Hope driving down the street. At least five of these tactical officers and their supervisor were patrolling in an area of but a few blocks surrounding the location of Hope's arrest. By the admission of one officer possibly six of the eight tactical

officers in the unit and their seargeant were then present at the scene of Hope's arrest. (Tr. 64).

No court as the Fifth Circuit Court of Appeals in United States v. Cruz, 581 F.2d 535, 542, (5th Cir. 1978) suggested, should be "gullible" as to the motivation involved in stopping a defendant and subjecting him to arrest and search.

The raison d'etre of these tactical officers is amply disclosed by this record. These are plainclothes officers, working in unmarked squad cars, specifically engaged in aggressive police work to combat gang activity and drugs. (Tr. 34). These police men and women are not traffic officers. They are not in the business of "routine traffic stops". Motor vehicle safety, is not their responsibility. They don't even carry traffic citation books on patrol to write

traffic tickets. (Tr. 60, 61).

As the Sixth Circuit Court of Appeals noted in United States v. Harris, 321 F.2d 739 (6th Cir. 1963) in affirming the suppression of evidence seized in a pretextual arrest situation, "The court is not bound to accept the purpose of arrest as stated by the agents as controlling." 321 F.2d at 741. Surely the conflicting, inherently implausible testimony of these police officers, otherwise unsupported by the record, should not be accepted at face value.

As to the first observations made at the scene, Leonard testified he saw a car double parked with a woman inside. (Tr. 37). Naughton, his partner, sitting in the same squad car said he saw the woman standing at the driver's side. (Tr. 130, 158). Naughton had even testified previously that he had first seen the

woman as she was driving through a stop sign. (Tr. 155).

Sergeant Cotter testified he had communicated with Leonard and Naughton as to their location, but Naughton testified he didn't expect to see Cotter on the scene. (Tr. 147). The issue was further confused by Leonard's testimony that Cotter came to the scene because he had previously checked the registration on the Cadillac. (Tr. 38).

There was nothing unusual about the station wagon driven by Hope on the date in question and he was not committing any moving violations. (Tr. 58, 75). Yet at 1:30 a.m. on a street heavily shaded by trees (Tr. 76) both Leonard (who was in pursuit of another vehicle) and Cotter testified that they recognized the driver of the station wagon to be William Hope. (Tr. 40, 103). Even these

observations are contradicted by Leonard's further testimony that he had notified Sergeant Cotter that it was Hope driving. (Tr. 40).

The testimony is further conflicting as to what occurred when Hope was actually stopped. Leonard stated at one point that he had made the stop (Tr. 43) yet later testified Cotter had stopped the vehicle. (Tr. 59). Cotter testified he had activated his emergency equipment (Tr. 104) and stopped the wagon. (Tr. 105-106).

A police report concerning the apprehension of the defendant was prepared and is contained in the record of this case. (R. page 31, attachment). All three officers involved (Leonard, Naughton and Cotter) testified the report was an accurate recitation of the facts surrounding the arrest. (Tr. 81,

119, 153). The report makes no reference to Cotter stopping Hope's vehicle and affirmatively states that it was Leonard and Naughton who made the stop. (Record of Proceedings, hereinafter "R", page 31, attachment). Even more troubling is the report's failure to indicate in any way at all that Cotter was even present on the scene. (R. page 31, attachment). Leonard admitted that it contained no such reference. (Tr. 85).

The record is replete with further contradiction as to the on the scene confrontation with the defendant. Cotter testified Hope was asked if he had a driver's license and replied that he did not. (Tr. 106). Leonard's testimony was that Hope was told that he was under arrest for driving without a license and that his license was suspended based on prior knowledge. (Tr. 41).

The officers who stopped and arrested William Hope claimed they did so because they knew that he had a suspended driver's license. Other than the muddled, self-serving testimony of the officers themselves that they "knew" Hope's license was suspended, issued a citation for this offense and checked the suspension in the computer, (Tr. 74) there is absolutely not a scintilla of evidence to support the proposition that Hope's license was suspended.

Leonard claimed to have signed a traffic ticket as a witness, but admitted he had not actually written a ticket. Moreover, he did not know who had. (Tr. 60-61). Cotter had not written it. (Tr. 60-61). Leonard further admitted that none of the officers on the scene of Hope's arrest <u>even</u> <u>had</u> <u>a</u> <u>ticket</u> <u>book</u>. (Tr. 60, 61).

The Fifth Circuit in Amador-Gonzales v. United States, 391 F.2d 308 (5th Cir. 1968) recognized specifically these circumstances in suppressing narcotics seized from a vehicle in a pretextual arrest situation, "narcotics officers do not generally make traffic arrests...they do not carry ticket books." 391 F.2d at 314. It is the departure from routine practice or procedure which cannot be overlooked. United States v. Hellman, 556 F.2d 442 (9th Cir. 1977). See also Taglavore, supra, and Warren v. City of Lincoln Nebraska, 816 F.2d 1254, 1257 (8th Cir. 1987) which focused on deviation from routine police procedure in pretextual arrest situations.

As to the non-existence of a ticket, Leonard, the government's first witness, was subjected to damaging cross-examination on the first day of trial.

Cotter and Naughton testified on the second day of trial and Officer Baiocchi testified in rebuttal on the third day. None of these officers offered a word of testimony to rebut the inference that a ticket had not been written.

Prior to trial the government filed with the Court and provided the defense a list of documentary evidence in the case. Although this itemization specifies a ticket issued to Ramirez, it contains no reference at all to a citation issued to Hope for driving on a suspended license. (R. 31, attachment, p. 1-8). No ticket was ever produced at trial. (Tr. 1-332).

There is not a word in the record to indicate what William Hope's license was purportedly suspended for. Surely the nature of the suggested traffic offense or suspension must be looked at in determining the reasonableness of the

arresting officers actions.[1]

A representative of the Illinois Secretary of State's Office testified as to information maintained by the Secretary of State concerning driver's licenses. (Tr. 224). He offered not a word of testimony nor a single exhibit to suggest that the defendant Hope's license was in fact suspended on the date of his arrest. (Tr. 223-232). There was no valid reason (certainly none supported by this record) for stopping Hope's car and subjecting him to search, his arrest was pretextual.

Officer Leonard's testimony, although guarded and evasive, points to

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[1]/ It should be noted that Illinois law provides for the suspension of drivers licenses for failure to pay parking tickets, Ill.Rev.Stat., Chap. 95 1/2, Sec. 6-306.1; as well as matters such as failure to comply with emission testing procedures. Ill.Rev.Stat., Chap. 95 1/2, Sec. 13 A-112(b).

the reality behind the detention of William Hope. Leonard testified cryptically that although he had not previously arrested Hope, he was "aware of Mr. Hope". (Tr. 75).

These tactical officers were "aware" of William Hope, surveilled his mother's home, converged on the scene of this arrest and searched his vehicle because they sought evidence against Hope the reputed gang leader, not Hope the alleged unsafe motorist.

The context in which officer Leonard was "aware" of William Hope became clear only at the sentencing hearing. The government disclosed that William Hope was viewed as the leader of the Black Gangster Disciples street gang, regarded as heavily involved in narcotics and violence. By the testimony of "street gang" experts, Hope's leadership of this

gang was suggested.

In light of the pretextual nature of the defendant's arrest, the lack of demonstrated probable cause or objective reasonableness in the actions of the police, this arrest was illegal. All evidence flowing from this arrest should be suppressed.

The Seventh Circuit's current position on pretextual arrests as articulated in this case and recent cases such as United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989), is unduly restrictive and inconsistent with the clear expressions of this Court and other circuit courts.

The Seventh Circuit in its Hope opinion summarily rejects any inquiry as to "usual police practices" testing in determining whether an arrest was pretextual. (United States v. Hope,

appendix page 4a hereinafter "Hope, app. p. 4a"). The Court relied heavily on its decisions in United States v. Kodorsky, 878 F.2d 991 (7th Cir. 1988) and United States v. Trigg, 878 F.2d 1037 (7th Cir. 1988). In Trigg the Seventh Circuit rejected any inquiry as to "participation of police officers in activities they would not ordinarily be engaged in" 878 F.2d at 1040, as well as any concerns over deviation from "usual police practices," 878 F.2d at 1041.

The Seventh Circuit in this case seems wholly unmindful of this Court's recent decisions in both Colorado v. Bertine, 479 U.S. 367, (1987) and Florida v. Wells, 495 U.S. ___, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990) which (in the context of inventory searches) reaffirm the idea that a search "must not be a ruse for a general rummaging in order to

discover incriminating evidence." 109 L.Ed.2d at 6. In the absence of specific policy governing such searches, the search in Wells was deemed not "sufficiently regulated to satisfy the Fourth Amendment..." 109 L.Ed.2d at 7. The opinion of the Seventh Circuit in this case totally vitiates this Court's continuing concern and focus upon whether or not police officers "acted in bad faith or for the sole purpose of investigation." Colorado v. Bertine, 479 U.S. at 372.

The position taken by the Seventh Circuit in this case, that the officers "actual motive in stopping Hope was...irrelevant," (Hope, app. 5a) if allowed to stand ends any constitutional protection from arbitrary police intrusion.

In Trigg the Seventh Circuit

declares this Court's position on pretextual arrests "ambiguous" and further states "...the Supreme Court has never directly confronted the issue of pretextual arrests..." 878 F.2d at 1039. Rather it is the Seventh Circuit's position which is ambiguous and which conflicts with the standards for lawful arrest articulated by this Court and followed by other circuit courts.

It is impossible to square the Seventh Circuit's position in this case with its even more recent opinion in United States v. Lewis, 910 F.2d 1367 (7th Cir. 1990). In Lewis, addressing a claim of pretextual arrest the court stated,

> "An otherwise valid search of an automobile will violate the Fourth Amendment if the grounds for the underlying stop or arrest are merely a pretext for the search itself."
> 910 F.2d at 1341.

The truly remarkable aspect of the Lewis

opinion is that the Seventh Circuit cites its Hope opinion as support for this proposition.

The Seventh Circuit in Hope and Trigg and other recent cases has held that the motivation of police in making traffic arrests and the irregularity of police procedures involved in the arrest are to be totally disregarded. These holdings are inconsistent with the decisions of this Court, other circuit courts and the Seventh Circuit's own Lewis opinion. This court should grant certiorari in this case to address these issues.

II. THE COURT OF APPEALS MISINTERPRETED ILLINOIS LAW IN DETERMINING WHAT CONSTITUTES A CONVICTION. THE PETITIONER WAS IMPROPERLY SENTENCED TO 30 YEARS INCARCERATION WITHOUT PAROLE UNDER THE SENTENCE ENHANCEMENT PROVISION OF 18 U.S.C. 924(e).

Convicted of the unlawful possession

of a firearm, Hope was sentenced to 30 years without parole, pursuant to the sentence enhancement provisions of 18 U.S.C. 924(e) concerning individuals previously convicted of three felonies. The Court of Appeals affirmed this sentence. One of the suggested convictions challenged was a 1975 proceeding on a burglary charge in which Hope elected to undergo drug treatment pursuant to the then existing Illinois Dangerous Drug Abuse Act, Ill.Rev.Stat., 1974, Chap. 91 1/2, Sec. 120.1 et seq.[2]

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[2]/ On appeal, Hope sought to supplement the record with or have judicial notice taken of the actual court records (transcript of proceedings and clerk's Memorandum of Orders, November 21, 1975, People of the State of Illinois v. Carmello Mason, #75-1754, in the Circuit Court of Cook County, Illinois) in the disputed case. The Court of Appeals found these records "relevant to matters at issue in the case, and in the interest of justice" (Hope, app. p. 10a fn. 1). The Court took judicial notice of these records.

In the 1975 proceedings, Hope (known as Carmello Mason in those proceedings) entered a plea of guilty in connection with a clearly negotiated settlement predicated upon his election to undergo drug treatment. The agreed disposition provided for his being referred to a drug program, thereby avoiding conviction, contingent upon his completion of the program. Hope had previously filed a motion for treatment and had been found acceptable. (Defendant's brief, appendix, hereinafter "Def. br. app." p. 3-B.)

The following proceedings were had:

> THE COURT: The way I handle it...the statute provides that if you elect to be treated as a drug addict, if you waive a speedy trial and also waive trial by jury, I would commit you to a drug program. If you successfully complete the drug program, you would be discharged from it. However, I have a different wrinkle in my courtroom here. I will only let you take advantage of this section of the statute if you enter a plea of guilty to the offense.

THE DEFENDANT: Uh-huh.

THE COURT: I would withhold the finding and the judgment. But the warning is that it is with the understanding that a fair sentence, based on your background and also the facts of the case, is a three-year-to-nine-year sentence in the Illinois Department of Corrections.

THE DEFENDANT: Uh-huh.
(Def. br. app. p. 3-B, 3-C).

The judge before whom the defendant appeared in 1975 on the burglary charge made it abundantly clear that he was withholding the finding, the judgment and the sentence in the proceedings. When the finding, judgment and sentence are withheld in a criminal proceeding and nothing of record discloses further judicial action, no conviction has been entered.

The Seventh Circuit opinion notes that Hope correctly advised the court that in determining what constitutes a conviction for purposes of 924(e) the

court must look "to the law of the state in which the proceedings were held. 18 U.S.C. Sec. 921(a)(20)." (Hope, App. p. 11, fn. 3).

Interpreting Illinois law, the court held that upon its analysis of the Illinois Dangerous Drug Abuse Act and Illinois law as to the meaning of conviction, the 1975 referral of the defendant for drug treatment upon a plea of guilty constituted a conviction. Illinois law is emphatically to the contrary. In People v. Teschner, 81 Ill.2d 187, 407 N.E.2d 49 (1980) the Illinois Supreme Court spoke directly to such a situation and stated:

> This court, on several occasions, has reviewed the Dangerous Drug Abuse Act and noted the differences between it and the Unified Code of Corrections. ...The treatment under the Act, unlike a sentence, is not a consequence of defendant's guilt. It is instead an alternative to a criminal conviction and the regular sentencing alternatives available under the Unified Code of

Corrections. (emphasis added)
81 Ill.2d at 193.

The Seventh Circuit reasoned that a conviction under Illinois law means either a "judgment of conviction or sentence entered upon a plea of guilty...." (Hope, app. p. 12a). The court further concluded that the defendant was "sentenced" to the drug abuse program and thus sustained a conviction. (Hope, App. p. 12a). This analysis is predicated upon a misapprehension of Illinois law.

The Seventh Circuit recognizes that under the Illinois Dangerous Drug Abuse Act, certain proceedings resulted in conviction, others did not. Yet the court's discussion of this distinction is abstract and without reference to the specific statutory provisions which differentiated these proceedings and

which establish beyond certainty that Hope's 1975 case did not result in conviction.

The Court correctly looks to Ill.Rev.Stat., Chap. 91 1/2, Sec. 120-8 for an overview of the eligibility requirements for treatment under the act. It fails to look further, however, to the two subsequent sections of the act which explain the separate and distinct procedures for (1) Persons charged with crime - Election to undergo treatment-Continuance of criminal charge (Ill.Rev.Stat., Chap. 91 1/2, Sec. 120.9) and (2) Persons convicted of crime-Placement on probation upon election to undergo treatment (Ill.Rev.Stat., Chap. 91 1/2, Sec. 120.10). (Appendix p. 20a).

Each of these sections has a specific procedural structure. While they share certain comparable provisions,

they are clearly established as distinctly different proceedings.

The two statutes are structured as follows:

Section 120.9 (Treatment referral without conviction)

-treatment supervision may not exceed 2 years
-treatment may include confinement

-if treatment is completed charge will be dismissed; if not, charge resumed

-formal waiver of right to speedy trial

-waiver of jury trial, consent to trial by court with general finding to be deferred

Section 120.10 (Conviction, Probation and Treatment)

-probation and treatment as a condition thereof for a period not to exceed the maximum sentence that could be imposed for the conviction or 5 years, whichever is less

-probation may include confinement

-adherence to the treatment program and other conditions of probation will result in discharge, failure to adhere to the treatment program is a violation of probation

-court may certify an individual for

> treatment regardless of the election of the individual

In holding that this defendant sustained a conviction in 1975 the Seventh Circuit states,

> ...the court sentenced him (defendant) to the Drug Abuse Program through Gateway House in lieu of a three-to-nine year term of imprisonment... (Hope, App. . 12a).

The court fails to recognize crucial aspects of Illinois law which irrefutably demonstrate that the 1975 proceeding was a non-conviction treatment referral proceeding under section 120.9, as opposed to a section 120.10 proceeding upon conviction.

First, there was no probation ordered - there was no "sentence" entered under the Illinois Criminal Code. If this 1975 proceeding had been a section 120.10 (conviction) proceeding the court would have been required to

sentence the defendant to probation. There is not a single reference to probation in the entire eleven page transcript of the 1975 proceeding. That a convicted defendant be placed on probation is required because a convicted person must be given a sentence - some sentence. Referral to a drug abuse program is not a sentence under Illinois law - probation is.

The Seventh Circuit correctly observes that the Dangerous Drug Abuse Act provided "... a sentencing alternative once criminal proceedings had culminated in a conviction." (Hope, app. p. 11a) It fails however to recognize the specificity of that sentencing alternative (Probation and treatment as a condition thereof) under the Act. Both People v. Dill, 23 Ill.App.3d 503, 319 N.E.2d 240 (4th Dist. 1974) and People v.

Smith, 23 Ill.App.3d 387, 319 N.E.2d 238 (4th Dist. 1974) which are relied on by the court, support this distinction. In Smith, upon the defendant's plea of guilty a "judgment of conviction" was entered and the State's Attorney recommended "probation". 319 N.E.2d at 240. The case was remanded for the trial court to consider "probation and treatment" and "an appropriate disposition". 319 N.E.2d at 240. In Dill, the defendant had plead guilty and had already been sentenced to probation. 319 N.E.2d at 241. Questions concerning his eligibility for treatment were raised in connection with a violation of that probation, and the court acknowledged that it was dealing with "...an individual convicted of a crime..." 319 N.E.2d at 243.

The transcript of proceedings on the

1975 case demonstrates that prior to the plea the petitioner,

1. had made a motion to be treated as an addict,
2. had been evaluated by the drug program,
3. had been found acceptable by the program, and
4. a representative of the program was present in court.
   (Def. Br. App., p. 3-B).

The defendant had taken all the steps for referral to the drug program prior to any plea. He elected to undergo treatment and avoid conviction. Of the two sections of the act his referral to the drug program was thus ever so clearly under the treatment referral, pre-conviction section (120.9).

Further, the court's statement that the defendant was "sentenced" to the drug abuse program is a non sequitur. No such

"sentence" could be imposed. Referral to the drug program was not a "sentence" existent under Illinois law. In People v. York, 87 Ill.App.3d 1026, 409 N.E.2d 525 (3rd Dist. 1980) the court stated,

> ...the Illinois Supreme Court has stated in both Phillips and Teschner that election to treatment under the Dangerous Drug Abuse Act is not a sentence, but is an alternative to the sentencing procedure.
>
> 309 N.E.2d at 529.

A "'Sentence' is the disposition imposed by the court on a convicted defendant". See Ill.Rev.Stat., Chap. 38, Sec. 1005-1-19. Only certain authorized dispositions are included under Illinois law. See Ill.Rev.Stat., Chap. 38, Sec. 1005-5-3. Referral to a drug program was not an authorized disposition under the code.

The Illinois cases which have recognized the distinction between these sections and which have held that a

treatment referral under section 120.9 without probation is not a conviction are legion.

In Teschner the Illinois Supreme Court stated,

> Section 9 of the Act sets forth the procedure if the person has been charged with a crime but not convicted. (Ill.Rev.Stat. 1977, Ch. 91 1/2, par. 120.9) Section 10 of the Act sets forth the procedure if the person who elects treatment has been convicted. (Ill.Rev.Stat. 1977, Ch. 91 1/2, par. 120.10).
>
> 81 Ill.2d at 192.

In People v. Caldwell, 118 Ill.App.3d 1027, 455 N.E.2d 893 (3rd Dist. 1983), the court recognized no conviction had occurred when the "final judgment" or "final disposition" had been withheld under Ill.Rev.Stat., Chap. 91 1/2 , Sec. 120.9, even after hearing stipulated evidence and finding the defendant guilty. 455 N.E.2d at 894, 895.

Finally, and most importantly, the 1975 proceeding itself irrefutably

demonstrates that this was a treatment referral rather than a conviction.

Section 120.9 (as detailed above) calls for a waiver of the right to speedy trial and waiver of jury trial. The defendant must be so advised. In 1975, the court advised this defendant,

> THE COURT: The way I handle it...the statute provides that if you elect to be treated as a drug addict, if you waive a speedy trial and also waive trial by jury, I would commit you to a drug program.
> (Def. Br. App. p. 3-B, 3-C).

Section 120.9 calls for the general finding to be deferred. The defendant was so advised. Had this been a sentencing upon a conviction the court could have imposed probation and treatment for a period not to exceed the maximum sentence (20 years, see Def. Br. App. p. 3-H) or 5 years, whichever was

less. The statute directed the court to so advise the defendant. There was no such advisement.

That this particular state court judge would only allow a defendant treatment for this addiction if a "plea" was entered does not in any way change the crystal clear fact that no conviction was imposed. This unique "wrinkle" as the court itself described it in no way suggests that this was a conviction. The mere acceptance of a plea does not constitute a conviction. It is not inconsistent with the "general finding" being deferred as the statute called for in 1975.

It is tremendously illuminating that the particular provision dealing with the deferral of the general finding was amended in 1979 to adopt the specific procedure employed by this state court

judge. The amended statute read,

> (f) entry of a judgment of conviction on a plea or finding of guilty shall be deferred until such time as the pending criminal proceeding is authorized under this Section to be resumed.
>
> Ill.Rev.Stat., Chap. 91 1/2, Sec. 120.9, as amended by P.A. 81-851, eff. Sept. 20, 1979.

Precisely this analysis was articulated in People v. Robinson, 84 Ill.App.3d 916, 406 N.E.2d 153 (1st Dist. 1980). Robinson dealt with a defendant charged with burglary who sought drug addiction treatment. The court in Robinson had entered a "general finding of guilty." 406 N.E.2d at 154. (It should be kept in mind that in Hope's 1975 case there was only a plea, the finding of guilty was specifically withheld. The court in Robinson stated,

> ...we discern an attempt to withdraw certain criminal defendants, who are drug addicts and likely to be rehabilitated, from the existing criminal machinery which ultimately

> results in either acquittal or conviction and sentence. Instead, a new alternative is offered. This alternative placed the defendants under the supervision of the Department and thereby diverts them from criminal conviction and sentence...
> 406 N.E.2d at 154-155.

Equally significant is the absence of any advisement that the defendant had a right to appeal from the proceeding. Unquestionably, had the court entered a conviction, the defendant would have been advised of his right to appeal the sentence and judgment of the court. Such rights were mandated by Illinois law under Ill.Rev.Stat., Chap. 110A, Section 402, 604(d) and 605(a) if a conviction were imposed. In their absence, the defendant was never afforded notice of the opportunity to challenge these proceedings. The defendant was not advised of his rights because no conviction was imposed.

In 1975 William Hope was referred

for drug treatment with the finding, judgment and sentence in his case withheld. There were never any further judicial proceedings in the case. There was no conviction. William Hope should not be subject to enhanced penalties in this case.

CONCLUSION

For the reasons discussed above, we respectfully petition this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that Court's judgment in the instant case.

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-3134

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM HOPE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 CR 298—**Nicholas J. Bua**, *Judge*.

ARGUED SEPTEMBER 15, 1989—DECIDED JUNE 27, 1990

Before CUDAHY and [illegible]*ayes*, and GRANT, *Senior District Judge.**

FACTS

GRANT, *Senior District Judge.* At approximately 1:15 a.m. on September 3, 1987, Chicago Police Officers Duane Leonard, James Naughton and John Cotter stopped two vehicles within close proximity of one another for purported traffic violations. Officers Leonard, Naughton and

* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

Cotter and other officers who arrived at the scene were assigned to the Nineteenth District Tactical Unit which focused on gang activity and narcotics. They worked in unmarked cars and wore plain clothes.

Theresa Ramirez, the driver of the first car, was stopped by Officers Leonard and Naughton when she was observed running a stop sign. Police searched the interior of the car, found marijuana in the back seat and placed Ramirez under arrest. The trunk of the car was subsequently searched, although officers at the scene testified that nothing was found during that search.

The driver of the second car was William Hope. At the time, Hope was a leading member of the notorious Black Gangster Disciples gang in Chicago. Officers Leonard, Naughton and Cotter testified at trial that they recognized Hope as the driver of the second car, and that they knew, based on a check run a week or so earlier, that his driver's license had been suspended. Based upon that information, they stopped Hope's vehicle and asked if he could produce a valid driver's license, to which he responded "no". In a routine search of the interior of Hope's car, police reported that they found a bullet and battery casing on the floorboard; that the top of the battery casing came ajar; and, that they discovered a loaded .38 revolver inside the hollowed out interior.

Hope, a convicted felon, was placed under arrest and was subsequently indicted for unlawful possession of a firearm which had previously travelled in interstate commerce, in violation of 18 U.S.C. § 922(g)(1). A superseding indictment was returned on June 27, 1988 charging the same offense.

Hope went to trial on September 6, 1988. He called one witness in his defense, Theresa Ramirez, a friend and neighbor and the driver of the first vehicle stopped by the police on September 3, 1987. Contrary to her prior statements to police, Ramirez testified at trial that the battery casing and the gun were hers, and that they were in the trunk of her car when she was stopped by the police.

The jury returned a verdict of guilty on September 9, 1988. During the sentencing phase of the proceedings, the government sought sentence enhancement under 18 U.S.C. § 924(e) on the ground that Hope had been convicted of three prior felonies. Hope's attorney filed a "Motion to Prevent Government from Using Alleged Convictions . . . to Enhance Sentencing," which the court denied. Finding the existence of the requisite three prior felonies, the district court sentenced Hope to thirty years without parole pursuant to 18 U.S.C. § 924(e). This appeal followed.

ISSUES

Hope challenges his conviction on several grounds. He contends that police lacked probable cause to arrest him on September 3, 1987 and to make a search of his vehicle incident to that arrest; that the district court improperly admitted a stipulation showing that he had previously been convicted of deviate sexual assault, a felony, without a limiting instruction; and that the evidence admitted at the trial was insufficient, as a matter of law, to permit a rational trier of fact to find him guilty beyond a reasonable doubt. Hope also challenges the enhancement of his sentence under 18 U.S.C. § 924(e), and the effectiveness of his counsel both at trial and during sentencing.

CONCLUSIONS

I. *Probable Cause for Arrest*

Hope maintains that his arrest was pretextual and without cause, and that any search incident to that arrest was therefore improper. In support of his position, Hope argues in rather summary fashion that the arrest was predicated on stale information; that the arresting officers were part of a tactical unit "engaged in aggressive police work to combat gang activity [and] narcotics . . ." whose responsibilities would not normally have included traffic patrol; and that they were obviously motivated by an improper purpose "to use a traffic arrest as a pretext for searching [his person] and his vehicle to potentially secure incrim-

inating evidence against him" because he was a gang member.

In response, the government contends that Hope waived any pretextual arrest argument by failing to raise it at trial. Even if the issue had been properly raised, the government maintains that the arresting officers possessed sufficient information to give them probable cause to arrest, namely the fact that Hope's driver's license had been suspended, and that the search of his car, including any containers within the passenger area, was proper.

Although Hope urges us to adopt a subjective or "usual police practices" test in determining whether his arrest was pretextual, we note that the test in this circuit has been, and remains, purely an objective one. *United States v. Trigg*, 878 F.2d 1037, 1040 (7th Cir. 1989); *United States v. Kordosky*, 878 F.2d 991, 992 (7th Cir. 1989); *United States v. McCarty*, 862 F.2d 143, 148 (7th Cir. 1988). "Under the objective test, the search incident to the arrest is legal so long as the arresting officer possesses sufficient information to give him probable cause to arrest," *Kordosky*, 878 F.2d at 993, and is authorized by law to effect a custodial arrest for the particular offense. *Trigg*, 878 F.2d at 1041 (refusing to follow "usual police practice" approach). Probable cause to arrest exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they [have] reasonable trustworthy information [are] sufficient to warrant a prudent [person] in believing that a [suspect] had committed or was committing an offense." *McCarty*, 862 F.2d at 147 (quoting *United States v. Lima*, 819 F.2d 687, 688 (7th Cir. 1987)). The officer's subjective reasons, or "motive", for stopping the defendant are relevant, if at all, only in establishing what facts the officer actually had knowledge of at the time of the arrest. *Kordosky*, 878 F.2d at 993; *McCarty*, 862 F.2d at 148 and n.3.

In the present case, the arresting officers testified that a computer check had been run on Hope a week or so before his arrest which revealed that Hope's driver's license had been suspended. When asked whether he could

produce a valid license, Hope responded that he could not. Contrary to Hope's contention, we find that the information upon which the officers relied was not "stale." Our decision in *United States v. Longmire*, 761 F.2d 411, 420 (7th Cir. 1985), does not suggest otherwise. While the officers may have been assigned to a tactical unit involved in gang activity, there is nothing in the record to indicate that they were not authorized to effect a custodial arrest for a traffic violation. The officers had sufficient information to warrant the belief that Hope was operating a vehicle without a valid driver's license in violation of state law, and thus had probable cause to arrest Hope on September 3, 1987. Their actual motive in stopping Hope was therefore irrelevant. *Kordosky*, 878 F.2d at 993; *McCarty*, 862 F.2d at 148 and n.3. Under the circumstances the search of the passenger compartment of Hope's car, including any containers within the passenger area, was proper. *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Karlin*, 852 F.2d 968, 970 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 1142 (1989).

II. *Sufficiency of the Evidence*

Hope maintains generally that the testimony of the three arresting officers (Cotter, Leonard and Naughton) was "conflicting [and] inherently implausible," and that Ramirez's testimony to the effect that the gun and battery casing were hers was "not materially contradicted or impeached." He concludes therefore that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. We do not agree.

It is our job on appeal to determine whether any rational trier of fact could have concluded given the evidence presented at trial that Hope was guilty of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Muehlbauer*, 892 F.2d 664, 666 (7th Cir. 1990). In making that determination, we look at the evidence in a light most favorable to the government. *Muehlbauer*, 892 F.2d at 666-67. To prove a violation of 18 U.S.C. § 922(g), the government

must have shown: (1) that Hope possessed a firearm; (2) that the firearm moved in or affected interstate commerce; and (3) that Hope had a prior felony conviction. *United States v. King*, 897 F.2d 911, 913 n.1 (7th Cir. 1990). Our review of the record shows that the government did, in fact, meet its burden of proof, and that there was sufficient evidence to convict.

To the extent Hope contends that the police officers' testimony was conflicting, we find the conflicts generally immaterial, and note that "questions of credibility and the weight to be afforded conflicting evidence are for the jury to resolve and their conclusions on such matters are accorded tremendous deference." *United States v. Jones*, 808 F.2d 561, 569 (7th Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987). We would also note that, contrary to Hope's contentions, Ms. Ramirez's testimony that the gun was actually in her possession was directly contradicted by the testimony of officers at the scene, and by her own previous statements.

III. *Admissibility of Stipulation*

It is undisputed that Hope stipulated to a material element of the offense charged, namely the existence of a prior felony. In Hope's case, the stipulation that he signed identified the nature of the prior felony as deviate sexual assault. This stipulation was admitted into evidence without objection, and without a request for a limiting instruction.

On appeal, Hope suggests that the stipulation was unnecessarily specific and unduly prejudicial, and that at a minimum it should have been accompanied by a limiting instruction. He contends that it was reversible error for the court not to instruct the jury *sua sponte* that the prior conviction could not be considered as evidence of a propensity to commit the crime charged.

The government contends that Hope waived any challenge to the admission of the stipulation by failing to raise the issue at trial. We agree.

Even if we were to consider Hope's belated objections, our review would be limited by the strict standards of the plain error doctrine of Fed. R. Crim. P. 52(a). *United States v. Wynn*, 845 F.2d 1439, 1442 (7th Cir. 1988); *United States v. Silverstein*, 732 F.2d 1338, 1349 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985). To establish plain error, Hope would have had to show that, but for the erroneously admitted evidence, he probably would have been acquitted. *Wynn*, 845 F.2d at 1443; *United States v. Whaley*, 830 F.2d 1469, 1476 (7th Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988). He has failed to do so.

We have stressed in the past, and reiterate here, that "evidence should not make the jury cognizant of any prior convictions beyond those necessary as an element of the offense." *King*, 897 F.2d at 913 (citing *United States v. Pirovolos*, 844 F.2d 415, 420 (7th Cir.), *cert. denied*, 109 S.Ct. 147 (1988)). To prove a violation of 18 U.S.C. § 922(g), however, the government must show that Hope had a prior felony conviction. *King*, 897 F.2d at 913 n.1. The government met its burden with respect to that element when it submitted proof in the form of a signed stipulation showing that Hope had previously been convicted of deviate sexual assault. The government did not attempt to introduce evidence of any other convictions beyond the one necessary as an element of the offense charged. Neither did it improperly suggest to the jury that Hope's prior conviction demonstrated a propensity to commit the offense charged.

While the nature of Hope's prior conviction may have been prejudicial, it did not involve the use of a weapon, and, in our opinion, "added very little to the case" against him. *Pirovolos*, 844 F.2d at 421. *See also King*, 897 F.2d at 914 ("Evidence of prior felony convictions for crimes involving use of a weapon tends to be more prejudicial to a jury deciding the guilt or innocence of a person accused of a weapons offense than evidence of crimes not involving use of a weapon."). Even if we were to exclude any reference to the specific nature of Hope's prior felony conviction, we find that there was substantial evidence

from which the jury could have reasonably concluded beyond a reasonable doubt that Hope was guilty of the offense charged, specifically, the testimony of the officers at the scene.

The error, if any, came in the district court's failure to offer a limiting instruction at trial. Under the circumstances, however, the absence of an instruction does not constitute plain error. We believe that a limiting instruction could have been given which "emphasized the jury's duty to convict [Hope] only by the evidence of possession presented by the government, and without considering his prior conviction[ ] as evidence of his propensity to" commit the crime with which he was charged. *King*, 897 F.2d at 915. The government, however, never argued, or otherwise suggested, that the jury should use the prior conviction as evidence of a propensity to commit the offense charged. Neither is there any indication that the government expounded upon the specifics of Hope's prior conviction. Given these factors, and the substantial nature of the other evidence against Hope, any error in failing to give a limiting instruction was harmless, *King*, 897 F.2d at 915, and falls far short of the plain error required under Fed. R. Crim. P. 52(a).

IV. *Sentence Enhancement*

Hope challenges the enhancement of his sentence under 18 U.S.C. § 924(e) on several grounds. He contends that (1) one of the three felonies, a 1975 burglary of a commercial building, used by the government as a basis for enhancing his sentence never culminated in a "conviction"; (2) a commercial burglary should not be a sentence enhancing offense under 18 U.S.C. § 924(e); and (3) the district court's failure to determine whether the proceedings in 1975 actually culminated in a conviction contravened due process of law.

Section 924(e) provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any

court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g), and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

A. *The Dangerous Drug Abuse Act*

Of the three prior felony convictions introduced in evidence, Hope challenges only one on appeal, a 1975 conviction in the State of Illinois for burglary. The government introduced evidence in the form of a "Certified Statement of Conviction" in which the Clerk of the Cook County Circuit Court certified that on November 21, 1975 Hope withdrew his original plea of not guilty to the offense charged and entered a plea of guilty and that on that same date "judgment was entered on the conviction and the defendant was sentenced . . . to Illinois Department of Corrections for a term of not less than three (3) years, nor more than nine (9) years. Defendant sentenced to the Drug Abuse Program thru Gateway House."

Hope maintains for the first time on appeal that, contrary to the Clerk's Certified Statement of Conviction, the court proceeding on November 21, 1975 never culminated in a conviction under Illinois law. He bases his argument on two separate, yet related, theories, contending that the sole purpose of Illinois' Dangerous Drug Abuse Act was to provide rehabilitative treatment to drug addicts in lieu of prosecution, *People v. Warren*, 69 Ill. 2d 620, 14 Ill. Dec. 879, 373 N.E.2d 10, 12 (Ill. 1977), and that the transcript of the hearing on November 21 actually evidences the state court's intention to offer Hope a rehabilitative treatment program as an alternative to

prosecution. Hope submits the transcript of that hearing and the Memorandum of Orders entered by the state court in support of his contention, and renews his motion to supplement the record or alternatively to have this court take judicial notice of that proceeding.[1]

The Illinois Dangerous Drug Abuse Act, Ill. Rev. Stat., ch. 91½, para. 120.8 (1973), provided:

> An addict charged with or convicted of a crime is eligible to elect treatment under the supervision of the Department instead of prosecution *or* probation,

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[1] While it is true that Fed. R. App. P. 10(a) does not contemplate the supplementing of the appellate record with evidence not presented to the district court, and that we generally will not consider facts which were not made a part of the record at the district court level, *Colonial Penn Insurance Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983), we have the power to take judicial notice of "proceedings in other courts, both within and outside of the federal judicial system, if the proceedings have a direct relation to matters at issue." *Green*, 699 F.2d at 369. This is true even though those proceedings were not made a part of the record before the district court. *Colonial Penn Insurance*, 887 F.2d at 1239; *E.I. DuPont de Nemours & Co., Inc. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984).

We find that the state court proceedings on November 21, 1975 are, in fact, relevant to matters at issue in this case, and, in the interest of justice, grant Hope's motion to take judicial notice of those proceedings and the Memorandum of Orders relating thereto. We find, however, in reviewing the transcript and the Memorandum of Orders, that the Clerk's Certified Statement of Conviction accurately reflects what transpired on November 21, 1975. These documents show (1) that Hope withdrew his plea of not guilty on November 21, 1975 and entered a plea of guilty to the offense charged (burglary of a commercial building); (2) that his petition to be treated as a drug addict under the Dangerous Drug Abuse Act was made after, or in conjunction with, his plea of guilty; and, (3) that Hope was sentenced to a rehabilitative treatment program, with the admonishment that, should he fail to complete that program, a three-to-nine year term of imprisonment would be imposed.

> as the case may be, unless * * * (e) the addict is on probation or parole and the appropriate parole or probation authority does not consent to that election * * *.[2]

(Emphasis added). *Warren*, 373 N.E.2d at 11; *People v. Phillips*, 66 Ill. 2d 412, 6 Ill. Dec. 215, 362 N.E.2d 1037, 1038 (Ill. 1977). While it is undisputed that one of the purposes of the Act was to create an alternative to criminal prosecution, *Warren*, 373 N.E.2d at 12, the language of section 120.8 makes it clear that was not the only purpose. The provisions of the Dangerous Drug Abuse Act provided both an alternative to prosecution, in which case proceedings would be stayed subject to dismissal pending the satisfactory completion of treatment, *see Phillips*, 362 N.E.2d at 1038; *Warren*, 373 N.E.2d at 11-12, *and* a sentencing alternative once criminal proceedings had culminated in a conviction. *See People v. Dill*, 23 Ill. App. 3d 503, 319 N.E.2d 240, 243 (Ill. App. 1974); *People v. Smith*, 23 Ill. App. 3d 387, 319 N.E.2d 238, 240 (Ill. App. 1974).

To the extent Hope maintains that the proceeding which took place in the Cook County Circuit Court on November 21, 1975 did not culminate in a conviction under Illinois law, we again must disagree.[3] Illinois law defines "conviction" as:

> a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

Ill. Rev. Stat., ch. 38, para. 2-5 (1962); Ill. Rev. Stat., ch. 38, para. 1005-1-5 (1973). While Hope argues that the pro-

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[2] The Illinois Dangerous Drug Abuse Act was systematically repealed from 1974-1984.

[3] Hope correctly notes that, in determining what constitutes a conviction for purposes of § 924(e), we must look to the law of the state in which the proceedings were held. 18 U.S.C. § 921(a)(2).

ceedings on November 21, 1975 did not culminate in a "judgment of conviction" or "finding of guilty", he ignores the disjunctive language of the statute which states that " 'conviction' means a judgment of conviction *or* sentence entered upon a plea of guilty. . . ." As the Illinois Court of Appeals noted in *People v. Pruitt*, 45 Ill. App. 3d 399, 4 Ill. Dec. 99, 359 N.E.2d 1051 (Ill. App. 1977), "The word 'or' in the statute must be accorded significance; whenever this disjunctive is used, the members of the sentence it connects are to be taken separately." *Pruitt*, 359 N.E.2d at 1052 (quoting *People v. Johnson*, 34 Ill. App. 3d 38, 339 N.E.2d 325, 327 (1975)).

It is clear from the Clerk's Certified Statement of Conviction that on November 21, 1975 Hope withdrew his plea of not guilty to the charge of burglary, and entered a plea of guilty; that the court *sentenced* him to the Drug Abuse Program through Gateway House in lieu of a three-to-nine year term of imprisonment, thus electing a rehabilitative rather than criminal sanction.[4]

B. *Nature of Offense*

Hope contends that, even if this court should find that he was actually convicted of the 1975 burglary, the nature of the offense, a commercial burglary, should not serve as an enhancement offense under 18 U.S.C. § 924(e). Hope acknowledges that there is Seventh Circuit authority which holds that any burglary is an offense which is

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[4] At the time of the 1975 offense, Hope was on parole from a prior burglary conviction in 1971. Under section 120.8(e) of the Dangerous Drug Abuse Act, Ill. Rev. Stat. 1973, ch. 91½, par. 120.8(e), Hope's parole officer was required to consent to the drug treatment program before the court could allow Hope to elect that program over incarceration. The parole officer's consent was never obtained, and Hope was accordingly ineligible to elect treatment under the Act as an alternative to either prosecution or a criminal sentence. It appears, however, that Hope's prior release status was unknown to the court on November 21, 1975.

within the scope of § 924(e), *United States v. Dickerson*, 857 F.2d 414, 419 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 1753 (1989), but suggests that it was inappropriate, given the nature of Hope's conviction, to use a conviction for commercial burglary as a basis for enhancing his sentence. *United States v. Chatman*, 869 F.2d 525, 529 (9th Cir. 1989); *United States v. Headspeth*, 852 F.2d 753, 758 (4th Cir. 1988).

We find Hope's argument unpersuasive in light of our more recent decision in *United States v. Dombrowski*, 877 F.2d 520 (7th Cir. 1989), in which we found that the term "burlary" in § 924(e)(2)(B) was intended by the legislature to encompass "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Dombrowski*, 877 F.2d at 530. We conclude, as we did in *Dombrowski*, that the commercial burglary of which Hope was convicted in 1975 qualifies as a sentence-enhancing offense under § 924(e). *See Dombrowski*, 877 F.2d at 530-531 and n.12.[5]

[5] The recent decision in *Taylor v. United States*, ___ U.S. ___, 110 S.Ct. 2143, 58 U.S.L.W. 4616 (May 29, 1990), does not dictate a contrary conclusion. Adopting a "generic" definition of "burglary", the Supreme Court in *Taylor* held that "a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 58 U.S.L.W. at 4623. At the time of Hope's arrest and conviction in 1975, the Illinois burglary statute provided that:

> (a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in The Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft. . . .

Ill. Rev. Stat., ch. 38, para. 19-1 (1961) (as amended by P.A. 77-906, effective August 17, 1971). Although the Illinois statute defines burglary to include places such as motor vehicles, and is therefore

(Footnote continued on following page)

C. *Due Process*

Hope makes a cursory argument that his sentencing contravened due process of law, based on the district court's purported failure to determine whether the proceedings in 1975 actually culminated in a conviction. The government maintains that the district court did, in fact, make an oral finding at the close of the evidence in the sentencing proceeding that ". . . the defendant was indeed convicted on at least three felonies involving violence . . .", and that the foundation for the enhanced sentence was properly made.

Prior to his sentencing hearing in the present case, Hope filed a Motion to Prevent Government from Using Alleged Prior Convictions To Enhance Sentencing. Hope contended that his three prior convictions could not be used as a predicate to sentence enhancement under 18 U.S.C. § 924(e) because (1) his conviction for deviate sex-

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[5] *continued*

broader than the "generic" burglary defined in *Taylor*, the government is not necessarily precluded from using a conviction under § 19-1 for sentence-enhancement purposes. *Id.* at 4623-24. Illinois' burglary statute includes within its definition of burglary the unlawful entry into a building with the intent to commit a crime, and to that extent comports with the "generic" definition of burglary adopted in *Taylor*. *Id.* at 4622-23. It is that provision of the statute with which Hope was apparently charged in 1975. The record shows that Hope was charged with a burglary which involved the unlawful entry into a building, namely a Chevrolet dealership, with the intent to commit theft, and that he pled guilty to that offense. See n. 1 *infra*. That the building was used for commercial purposes is of no consequence. See *Taylor*, 58 U.S.L.W. at 4622 ("Congress presumably realized that the word "burglary" is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force."); *Dombrowski*, 877 F.2d at 530. The offense with which Hope was charged and convicted in 1975 thus satisfied the elements of a generic burglary and was properly used as a predicate to sentence-enhancement under 18 U.S.C. § 924(e). See *Taylor*, 58 U.S.L.W. at 4623-24.

ual assault was not a felony involving violence; (2) the 1970 and 1975 convictions for burglary of a commercial building did not involve the use of a weapon and were therefore not felonies involving violence; and (3) the sentence on the 1975 burglary was in violation of Hope's constitutional guarantees of due process, effective assistance of counsel and involuntary self-incrimination. The district court summarily denied the defendant's motion.

It is undisputed that the government has an affirmative duty to prove the absence of a constitutional defect in a prior conviction which it intends to use as a predicate to sentence enhancement once a constitutional challenge has been raised. *Crovedi v. United States*, 517 F.2d 541, 543 (7th Cir. 1975). The constitutional challenges which Hope raised at the trial level, however, were conclusory in nature and lacked both a factual and legal basis. Hope presented no evidence whatsoever to suggest that his plea of guilty in 1975 was not knowingly and voluntarily made, that his attorney at the time rendered constitutionally ineffective assistance, or that he was otherwise denied "due process." Neither did he demonstrate a factual or legal basis for the proposition that deviate sexual assault and commercial burglary are not violent felonies within the meaning of § 924(e). Under the circumstances, we find that neither the government nor the court was under a duty to make further inquiry into the constitutional validity of Hope's prior convictions. We, accordingly, reject Hope's argument that his sentencing contravened due process of law.

V. *Ineffective Assistance of Counsel*

Hope contends, in his final argument, that his privately retained counsel rendered constitutionally ineffective assistance during his trial and at his sentencing hearing. He claims that his representation at trial was ineffective because his attorney agreed to stipulate that he had previously been convicted of deviate sexual assault. Hope also criticizes his attorney for failing to request a cautionary

instruction explaining the limited purpose for which evidence of the defendant's prior conviction was received. Hope alleges that his representation at sentencing was ineffective because counsel proceeded to sentencing without providing the court with the transcript of the prior sentencing hearing on November 21, 1975.

The defendant bears a heavy burden in establishing an ineffective assistance claim. *United States v. Moya-Gomez*, 860 F.2d 706, 763 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 3221 (1989); *United States v. Grizales*, 859 F.2d 442, 447 (7th Cir. 1988). To overcome the strong presumption that counsel rendered reasonably effective assistance, Hope must show that his trial counsel's performance fell below an objective standard of reasonableness, and that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *United States v. Snyder*, 872 F.2d 1351, 1358 (7th Cir. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. With this standard in mind, we review the totality of the circumstances to determine whether counsel rendered constitutionally ineffective assistance. *United States v. Zylstra*, 713 F.2d 1332, 1338 (7th Cir.), *cert. denied*, 464 U.S. 965 (1983). Based on our previous findings, however, we can reach but one conclusion, that Hope has failed to support his claim of ineffective assistance of counsel.

One of the elements of the offense with which Hope was charged required the government to show that Hope had a prior felony conviction. 18 U.S.C. § 922(g)(1); *King*, 897 F.2d at 913 n.1. The danger inherent in submitting evidence of a prior conviction to a jury is self-evident, for it is generally accepted that "a jury may be willing to convict a defendant based on the inference that he or she was acting in conformity with past misconduct rather than upon the government's proof beyond a reasonable doubt. . . ." *United States v. Lowe*, 860 F.2d 1370, 1381-82 (7th

Cir. 1988), *cert. denied*, 109 S.Ct. 1639 (1989). The potential for prejudice, however, existed with or without the stipulation. As a matter of trial strategy, defense counsel had to choose between the lesser of two evils: stipulate to the prior conviction or allow the government to submit proof of that conviction. Under the circumstances, we fail to see how the decision to stipulate to the prior conviction rendered counsel's performance constitutionally ineffective.

We find but one incident which might suggest that counsel's performance may have fallen "outside the range of professionally competent assistance," *Strickland*, 466 U.S. at 690, that being his failure to request a limiting instruction with respect to the admissibility of the stipulation regarding Hope's prior conviction for deviate sexual assault. We have previously found that a limiting instruction would have been appropriate under the circumstances. Hope, however, must also show that there was a "reasonable probability that, but for counsel's unprofessional error[ ], the result of the proceedings would have been different." *Id.* at 695. He has failed to do so. As we noted earlier, while undoubtedly prejudicial, the evidence of Hope's prior conviction was necessary to prove the crime charged, and otherwise added little to the case against him. The government did not expound upon the specifics of the crime, or suggest to the jury that Hope's prior conviction showed a propensity to commit the crime with which he was charged. *See King*, 897 F.2d at 914; *Pirovolos*, 844 F.2d at 421.

To the extent Hope alleges that his representation at sentencing was ineffective because counsel proceeded to sentencing without providing the court with the transcript of the prior sentencing hearing on November 21, 1975, we have previously concluded that the transcript of the state court proceeding on November 21, 1975 is not materially inconsistent with the Certified Statement of Conviction which was admitted at trial as evidence of a prior felony conviction.

VI. *Summary*

For the foregoing reasons, we now AFFIRM Hope's conviction and the enhancement of his sentence under 18 U.S.C. § 924(e).

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 19, 1990.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. ROBERT A . GRANT, Senior District Judge*

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
No. 88-3134 vs.	)
	)
WILLIAM HOPE,	)
	)
Defendant-Appellant.	)

Appeal from the United States District court for the Northern District of Illinois, Eastern Division.

No. 88 Cr 298

Nicholas J. Bua, Judge.

O R D E R

On consideration of the petition for

rehearing and suggestion for rehearing en banc filed in the above-entitled cause by the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petiiton for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, hereby denied.

Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, should not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Illinois Revised Statutes, 1974, Chapter 91 1/2, Section 120.9:

Persons charged with crime--Election to undergo treatment--Continuance of criminal charge. If a court has reason to believe that an individual charged with a crime is an addict or the individual states that he is an addict and the court finds that he is eligible to make the election provided for in Section 8, the court may advise him that the prosecution of the charge may be continued if he elects to submit to treatment and is accepted for treatment by the Department. In offering an individual an election, the court shall advise him that (a) if he elects to submit to treatment and is accepted, he may be placed under the supervision of the Department for a period not to exceed 2 years; (b) during treatment he may be confined in an institution or, at the discretion of the Department, he may be released for supervised aftercare treatment in the community; (c) if he completes treatment, the charge will be dismissed, but if he does not, prosecution on the charge may be resumed;

(d) such an election constitutes a formal waiver of the right to a speedy trial, as preserved by Article 2, Section 9 of the Constitution of Illinois and by Section 103-5 of the Code of Criminal Procedure and (e) to make such an election, he must waive a jury trial and consent to a trial by the court with the general finding to be entered by the court to be deferred until such time as prosecution is authorized under this Section to be resumed.

Illinois Revised Statutes, Chapter 91 1/2, Section 120.10

Persons convicted of crime--Placement on probation upon election to undergo treatment. If a court has reason to believe that an individual convicted of a crime is an addict or the individual states that he is an addict and the court finds that he is eligible to make the election provided for under Section 8, the court may advise him that he may be placed on probation if he elects to submit to treatment and is accepted for treatment by the Department. In offering an individual an election, the court shall advise him that (a) if he elects to submit to treatment and is accepted he may be placed on probation and under supervision of the Department for a period not to exceed the maximum sentence that could be imposed for his conviction or 5 years, whichever is less; (b) during probation he may be confined to an institution or, at the discretion of the Department, he may be released for supervised aftercare treatment in the community; and (c) if he adheres to the

treatment program and fulfills the other conditions or probation, he will be discharged, but any failure to adhere to the treatment program is a breach of probation. The court may certify an individual for treatment while on probation under the treatment supervision of the Department and probation supervision of the proper probation authorities regardless of the election of the individual.